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SUPREME COURT, U.S.

No. 07-140

In The

Supreme Court of the United States

WILLIAM LEE,

Petitioner,

v.

YORK COUNTY SCHOOL DIVISION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a school principal, charged with supervising the posting of materials on the walls of a public high school classroom, which walls are available for use only by school teachers, may properly regulate a teacher's curricular postings on those walls.

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INTRODUCTION

This case arises from a school principal's proper removal of curricular materials posted on a bulletin board in a public classroom. Petitioner William Lee, a Spanish instructor at Tabb High School in York County, Virginia, posted a number of items of a religious nature on the walls of his classroom, in which attendance is compulsory. These items included: (1) a 2002 National Day of Prayer poster, featuring George Washington kneeling in prayer; (2) a May 15, 2004 *Daily Press* news article entitled "The God Gap," outlining religious and philosophical differences between President Bush and Democratic candidate John Kerry; (3) an October 14, 2002 *USA Today* news article entitled "Whitehouse Staffers Gather For Bible Study," describing how then Attorney General Ashcroft led members of his staff in voluntary Bible study sessions; (4) a November 1, 2001 *Daily Press* news article detailing the missionary activities of a former Virginia high school student, Veronica Bowers, who died when her plane was shot down in South America; and (5) a June 2001 Peninsula Rescue Mission news letter, highlighting Bowers' work, and providing the address to which donations might be sent in support of the Mission.

After receiving notice from York County School administrators that a citizen had complained about the religious nature of items posted within Lee's classroom, Principal Crispin Zanca went to Lee's classroom to discuss the matter with him. Lee happened to be out sick that day. Zanca examined the

items posted on the bulletin board and removed the referenced items and placed them upon Lee's desk in the teacher's lounge with an explanatory note. Exercising his judgment, Zanca did not remove other materials posted on the bulletin board, most of which had discernible ties to Lee's Spanish classes.

Analyzing cross motions for summary judgment, the trial court, relying upon *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (*en banc*), applied the Supreme Court's *Pickering-Connick* analysis to assess whether Lee's posting constituted speech protected by the First Amendment of the United States Constitution. *See Lee v. York County School Division*, 418 F. Supp. 2d 816, 822 (E.D.Va. 2006); *see also*, *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Concluding that the removed items were, as a matter of law, curricular in nature, the trial court determined that the items were not a matter of public concern and therefore not entitled to First Amendment protection. *See Lee*, 418 F. Supp. 2d at 825-829.

On appeal, in a thorough opinion which outlined the analytical framework and precedent governing "teacher speech," the United States Court of Appeals for the Fourth Circuit affirmed the decision of the trial court, determining that the postings were curricular in nature as a matter of law, were not on a matter of public concern, and therefore not entitled to protection under the First Amendment to the United

States Constitution. *See Lee v. York County School Division*, 484 F.3d 687 (4th Cir. 2007). Contrary to Petitioner's assertions, the Fourth Circuit's opinion is wholly consistent with this Court's decisions and the Constitution, and there is nothing novel or unresolved that warrants this Court's review.

STATEMENT OF THE CASE

The underlying facts are not in dispute as both parties filed motions for summary judgment. An accurate and fair summary of the case is set forth in Judge King's panel opinion:

> Lee maintains on appeal that he can post any materials he wishes on the classroom bulletin boards provided that, in so doing, he speaks not as a teacher, but instead as a private citizen only. He thus maintains that the fact he posted the Removed Items in his classroom is irrelevant to the issue of whether he was acting as a private citizen or as a school teacher. Lee further contends that each of the Removed Items constitutes speech concerning a public matter, because each item involves either a political issue or a matter of interest to the community. He emphasizes that, notwithstanding their religious overtones, the Removed Items involved political information and issues (*e.g.*, the article "The God Gap," explaining information on presidential candidates; the article "White House Staffers Gather For

Bible Study," outlining activities of an Attorney General; and the National Day of Prayer poster, advertising a Presidential Proclamation) and matters of general community interest (*e.g.*, the articles concerning a local woman killed in a plane crash).

Contentions such as these might normally be persuasive, and they could well lead a court to conclude that contested speech was made by a private citizen on a matter of public concern. In this case, however, Lee's contentions fail to take account of important considerations of precedent. Court's have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums.

Of additional importance, the enhanced right of a school board to regulate the speech of its teachers in classroom settings is supported by the Supreme Court's explicit recognition that *First Amendment* free speech rights in a school environment are not "automatically co-extensive with the rights of adults in other settings." As the *Hazelwood* Court explained, the exercise of such rights "must be applied in light of the special characteristics of the school environment." Put simply, our school systems are responsible for adequately and properly educating our youth. A school board carrying out this vital responsibility is entitled to some enhanced control

> over expressions within its classrooms, so that it can "assure . . . that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." Thus, "[a] school need not tolerate student [or teacher] speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school."

Lee, 484 F.3d at 694-696.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with the decisions of this Court, the Fourth Circuit Court of Appeals, or the United States Constitution; nor does it create a conflict with decisions from other Circuit Courts of Appeals. The Fourth Circuit correctly construed and applied governing precedent. Indeed, while there is no other appellate case directly on point, a closely analogous case from the Ninth Circuit fully supports the decision below. *See Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1005 (9th Cir. 2000), *cert. denied*, 532 U.S. 994, 121 S. Ct. 1653, 149 L. Ed. 2d 636 (2001) (upholding the removal of teacher posted materials on the *outside* of his classroom door).

I. Lee's Postings Constituted Curricular Speech That Is Not Protected by the First Amendment

The District Court and the Fourth Circuit Court of Appeals properly determined that the materials posted by Lee were curricular in nature. Although Lee opined in his deposition that these items were not curricular, the materials were posted by Lee in a classroom setting in which his minor students' attendance was compulsory. Lee did not post these materials outside of his office door, or even in his office itself. And, with these postings, Lee was not writing a letter to the local newspaper, the student newspaper, or expressing himself during free period in the hallways, the lunchroom, or on the front walk. Rather, Lee posted these materials *within* the classroom setting, thus rendering them curriculum related. Moreover, Lee admitted in his deposition that part of the reason he posted the materials was to impart knowledge or ideas to his students. *See Lee*, 418 F. Supp.2d at 825-826. In that regard, in a classroom where attendance is compulsory, Lee's postings carried the imprimatur of the school. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

The District Court and the Fourth Circuit Court of Appeals reached the conclusion that the materials were curricular after examining Lee's deposition testimony in detail, and noting a number of instances in which he explained his teaching methodology, and his desire to post materials in order to engage his students' attention. *See Lee*, 484 F.3d at 691, 697-700.

Lee's use of these materials to accomplish his teaching goals renders the materials curricular, regardless of their direct link to the topic being taught.

The District Court and the Fourth Circuit Court of Appeals then correctly concluded that the appropriate standard for reviewing the First Amendment rights of a teacher-employee in a public school setting is the *Pickering-Connick* standard. *See Lee*, 418 F. Supp. 2d at 822, *aff'd*, 484 F.3d at 693-694; *see also*, *Boring*, 136 F.3d at 371; *Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138; *Chiras v. Miller*, 432 F.3d 606, 617 (5th Cir. 2005). As the District Court aptly noted, this case is "not about what free speech rights Lee has as an individual expressing himself on private property. Rather, this case is a question about what free speech rights Lee has as a public school teacher-employee." *Lee*, 418 F. Supp. 2d at 821-822.

Contrary to Lee's assertions, this Court's recent decisions confirm that the Fourth Circuit correctly analyzed Lee's classroom "speech" under the *Pickering-Connick* standard. *See Tennessee Secondary School Athletic Assoc. v. Brentwood Acad.*, 127 S. Ct. 2489, 2495, 168 L. Ed. 2d 166, 173 (June 21, 2007) (citing, *Connick* for the proposition that "the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights. . . ."); *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958, 164 L. Ed. 2d 689, 698-99 (2006) (analyzing an employee's retaliation claim based upon the employee's speech under the *Pickering* analysis). Indeed, this Court reiterated in *Garcetti* that public

employees who "make statements pursuant to their official duties . . . are not speaking as citizens for first amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetii*, 126 S. Ct. at 1960, 164 L. Ed. 2d at 701.

Furthermore, Lee's reliance upon this Court's most recent school speech case, *Morse v. Frederick*, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (June 25, 2007), is misplaced. First, *Morse* addresses student, and not teacher, speech. Second, this Court reiterated in *Morse* that "schools may regulate some speech 'even though the government could not sensor similar speech outside the school.'" *Morse*, 127 S. Ct. at 2627, 168 L. Ed. 2d at 301.

Lee challenges the Fourth Circuit's ruling by contending that even under the *Pickering-Connick* analysis, his expression was nevertheless protected because it related to matters of public concern. Both the District Court and the Fourth Circuit Court of Appeals correctly concluded, however, that Lee's speech was not a matter of public concern, noting that Lee himself had stated repeatedly in his deposition that he posted the materials at issue because *he* liked them. Furthermore, the balancing test used to analyze matters of public concern under the *Pickering-Connick* doctrine likewise requires the removal of the materials.

The *Pickering-Connick* standard requires a two-step analysis. First, the court must determine whether the speaker is a private citizen addressing

an issue that is of public concern. *See Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000). Whether a citizen was speaking as a private citizen is answered by determining "whether the speech is 'made primarily in the [employee's] role as a citizen or primarily in his role as an employee.'" *Id.*, at 407 (quoting *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)); *see also, Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (finding an assistant district attorney who drafted an internal memo and testified to its contents pursuant to his official duties is not speaking as a citizen for First Amendment purposes).

In this case, Lee's speech was posted on the walls of the classroom in which he was assigned to instruct public high school students. His speech was not that of his personal opinions made in letters to the editor, letters to the school newspaper, or in any other manner that would give rise to a conclusion that these postings were private speech on a matter of public concern. Rather, Lee's postings were solely, by his own admission, designed to be seen by and to engage his *students*, and encourage them to learn or consider things he deemed important. Lee may have utilized only materials that he personally enjoyed, but he did so in the classroom for the purpose of grabbing the attention of students within the curricular setting, not the public at large. Lee may not "shed [all his] constitutional rights to freedom of speech or expression at the schoolhouse gate" *see Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506, 89 S. Ct.

733, 21 L. Ed. 2d 73 (1969), but in the context of his posting materials on a *classroom* bulletin board, to impart messages to his students, he is plainly acting as a teacher-employee whose conduct may (and in this matter had to) be regulated by his employer.

Moreover, Lee's postings do not constitute speech on a matter of public concern, and therefore they are afforded no Constitutional protection. *See Stroman v. Colleton County School Dist.*, 981 F.2d 152, 156 (4th Cir. 1992). It is important to note that Lee seeks to have this issue addressed in his favor, inconsistently, both ways. First, he asked the appellate court to determine that speech posted by a school teacher in his classroom for the purpose, at least in part, of instructing his students and encouraging their attention is nonetheless private speech. *See Lee*, 484 F.3d at 694. However, recognizing that private citizen speech on a matter of private concern is not protected by the First Amendment, Lee next urges this Court to find that his speech, though private, was on a topic of public concern. *See id.* at 695. Lee is wrong on both counts.

By Lee's own admission, he posted these materials not only to engage his students, but because of his desire to demonstrate his own *personal* and deeply held religious faith, and his desire to witness that faith to his students. Thus, although Lee's speech was curricular in that he made the postings to attract the attention of his students, such that the speech was not on a matter of public concern, it also was done to

express and promote his own personal religious views, confirming its non-public nature.

II. Lee's Postings Were Not Protected Speech in a Nonpublic Forum and Were Not "Censored" on the Basis of Viewpoint in Violation of the First Amendment

Although not specifically addressed by the Fourth Circuit Court of Appeals, the District Court also correctly concluded that the School Board had not created a designated public forum for Lee to express himself through the classroom walls. *See Lee*, 418 F. Supp.2d at 829-833. In examining whether a limited public forum has been created, a court must look to whether or not the Government has made the property "generally available" for free expression purposes. *E.g., Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679, 887 S. Ct. 1633, 1642, 140 L. Ed. 2d 875 (1998); *see also*, *Widmar v. Vincent*, 454 U.S. 263, 264, 102 S. Ct. 269, 272, 70 L. Ed. 2d 440, 444 (1981). A limited public forum is not created "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567, 580 (1985). In order to demonstrate that a limited public forum had been created, Lee was required to allege and prove that the school had a clear intent to open the forum to limited public discourse. *See Hazelwood School Dist. v.*

Kuhlmeier, 484 U.S. 260, 270, 108 S. Ct. 562, 569, 98 L. Ed. 2d 592, 605 (1988).

As the District Court correctly noted, though, Lee himself admitted that teachers were the only ones permitted to post materials upon the classroom walls. *See Lee*, 418 F. Supp. 2d at 829. Furthermore, Lee's postings were designed to reach the limited audience of his students, whose attendance in that classroom was compulsory. Finally, the only evidence before the District Court was that not all materials could be posted by teachers upon classroom walls. Principal Zanca testified that profanity, materials related to substance abuse, or other materials offensive to students could not be posted. Zanca also testified that the Principal retained discretion to disapprove of materials posted within classrooms. Lee did not present any evidence in conflict with Zanca's testimony on this topic. *See id.* at 831-832. As a result, the District Court correctly concluded that the School Board had not created a limited public forum and also correctly held that the school could control the content of these materials.

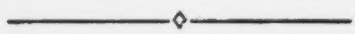
III. The School Properly Limited Lee's "School Sponsored" Speech in Order to Comply with the Establishment Clause

Even if Lee's speech is deemed school sponsored speech, the school's actions did not violate Lee's Constitutional rights and indeed were required under the Establishment Clause. School sponsored speech is

analyzed using the Supreme Court's analysis in *Kuhlmeier*, 484 U.S. at 270-271, 108 S. Ct. at 569-570, 98 L. Ed. 2d at 604-605. Under *Kuhlmeier*, the school "may exercise editorial control over speech at a public high school, 'so long as [its] actions are reasonably related to legitimate pedagogical concerns.'" *Fleming v. Jefferson County School Dist.*, 298 F.3d 918, 923-24 (10th Cir. 2002) (quoting *Kuhlmeier*, 484 U.S. at 272, 108 S. Ct. at 571, 98 L. Ed. 2d at 606). Where the school has not opened up a forum to "indiscriminate use," it can regulate the content of the forum in "any reasonable manner." *Kuhlmeier*, 484 U.S. at 270, 108 S. Ct. at 569, 98 L. Ed. 2d at 605. The school's restrictions are not required to be viewpoint neutral because schools must "retain the authority to refuse to sponsor [student] speech that might reasonably be perceived . . . to associate the school with any position other than neutrality on matters of political controversy." *Fleming*, 298 F.3d at 928. Ultimately, the *Fleming* Court determined that a school does not violate First Amendment rights by prohibiting religious references on tiles posted in the hallways of a public high school. *Id.* at 934. Doing so, the *Fleming* Court determined, conveyed a level of approval of the message, and the school had a legitimate pedagogical concern "to avoid the divisiveness and disruption from unrestrained religious debate . . ." *Id.* at 930-932.

Here, not only is Lee's speech, exhibited in his classroom while instructing students in a compulsory setting, curricular and that of the school itself, but

Tabb High School plainly had a legitimate pedagogical concern in preventing speech that Lee himself admits was designed to promote his personal religious faith. The speech occurred in the classroom, not an open public forum. And, critically, Lee admits that the speech was not directly related to the content of his instruction, and further admits that he posted these materials to demonstrate his own personal faith and to encourage his students not to be ashamed of theirs. An independent review of these materials in the context in which they were presented requires the conclusion that, at least in part, they were placed on the walls in an effort to promulgate certain personal religious beliefs. Lee's deposition admissions confirm this conclusion. Under these circumstances, the school not only had a legitimate interest in removing the materials, but was required to do so, to prevent the endorsement of one religion by a school employee in a classroom setting.[1]



[1] That Principal Zanca let other posted materials remain does not help Lee's contentions. Zanca exercised his best discretion, as he is charged to do, and removed those materials he believed violated the Establishment Clause; that he arguably should have removed other materials doesn't factually or legally transform the removed materials into protected speech.